SUPREME COURT U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 709

MARTHA G. WHITFIELD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

CLAUDE L. ROWE,
910 Security Bank Building,
Fresno, California 93721,
Attorney for Petitioner.

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MARTHA G. WHITFIELD,
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to the United States Court of Appeals
for the Ninth Circuit

Your petitioner respectfully shows:

I

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion and judgment of the Court of Appeals for the Ninth Circuit is set forth in the appendix of this petition as Appendix A (No. 22,682), there is no official report on this judgment as yet. The order of the District Court denying petitioner's motion to cor-

rect or set aside petitioner's sentence under Rule 35 of Federal Rules of Criminal Procedure is set forth in Appendix B of this petition. The original conviction and sentence of defendant in the District Court is unreported, but is set forth as Appendix C of this petition.

The judgment of the Court of Appeals from the appeal from the original conviction and sentence of petitioner appears as *Whitfield v. United States of America,* 383 F. 2d 142 (9th Cir., 1967).

II

DECISION ASKED TO BE REVIEWED.

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed is set forth in Appendix A of this petition. The date of said judgment is October 7, 1968. There was no order or petition for rehearing in the Court of Appeals and no extension of time by this Court in which to petition for certiorari. The date of this petition for certiorari is November 1, 1968 and is being mailed to the Clerk of the United States Supreme Court air mail on November 1, 1968.

III

JURISDICTIONAL STATEMENT.

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment set

forth in Appendix A is that part of Section 1254, Title 28 U.S.C. reading as follows:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The basis for federal jurisdiction in the Court of the first instance is Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201 (1964)) and Rule 35 of Federal Rules of Criminal Procedure.

IV

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner, Martha G. Whitfield, a widow and owner of a small motel in the town of Delano, California, was convicted in the District Court of the Eastern District of California under the "net worth theory" of two counts of willful attempt to evade and defeat payment of Federal Income Taxes for the years 1958 and 1959 in violation of Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201 (1964).) The District Court denied petitioner's application for probation and sentenced her to one year on each of the two counts, sentences to run concurrently. (See Appendix C of this Petition.) On appeal from the conviction the Court of Appeals for the Ninth Circuit affirmed. (*Whitfield v. United States,* 9th Cir., 383 F. 2d 142.)

On the day mandate was issued, petitioner filed a motion under Rule 35 of Federal Rules of Criminal Procedure to vacate, correct or reduce her sentence on the following grounds, among others:

1. That the denial of probation on the ground that petitioner would not admit her guilt before sentence by the District Court was arbitrary and an abuse of discretion of the District Court, and

2. Upon the ground that her conviction was obtained on false testimony when the prosecuting attorney knew or should have known was false. (Volume 1 Record page 66.)

The District Court denied Petitioner's motion to vacate, correct or reduce her sentence on December 18, 1967. (Appendix B of this petition.)

The denial of petitioner's motion was on the ground that petitioner was not entitled to probation because she did not confess her guilt, though innocent, after conviction and before sentence and thus waive her right to appeal.

> "The Court: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here and, of course, that's the probation officer's point, *that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate,* so there isn't anything he can do and, further, probation has to be based upon trust and confidence and *if she won't tell the truth to the probation officer or to the Court, then there's no basis for probation.*" (Reporter's Transcript, December 18, 1967, page 12, line 13.)

Petitioner then again appealed to the Court of Appeals which, on October 7, 1968, affirmed the order of the District Court of December 18, 1967 denying petitioner's motion under Rule 35 of Federal Rules of Criminal Procedure. There is no official report of the decision of the Court of Appeals, but it is set forth as Appendix A of this petition.

V

QUESTIONS PRESENTED FOR REVIEW.

1. Was denial of probation by the District Court on the ground that petitioner would not plead guilty and that she maintained her innocence after her conviction by a jury and before sentence by the District Court and the denial of petitioner's motion under Rule 35 of Federal Rules of Crininal Procedure an abuse of discretion of the District Court and did the Court of Appeals commit reversible error?

2. Is the decision of the Court of Appeals that the innocent petitioner would not have waived her right to appeal by admitting her guilt in the District Court in order to get probation in error?

3. Was the decision of the Court of Appeals that evidence de hors the record was inadmissible under a motion under Rule 35 of Federal Rules of Criminal Procedure in error?

4. Is the decision of the Court of Appeals that the use of evidence by a government prosecutor in an income violation case which was either false or which

he should have known to be false, was not grounds for vacating and correcting the District Court's judgment under Rule 35 of Federal Rules of Criminal Procedure in error?

VI

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. That the Court of Appeals in its judgment of October 7, 1968, so far departed from the accepted and usual course of judicial proceedings and sanctioned and approved such a departure from the accepted course of judicial proceedings by the District Courts in the District Court's denial of probation because the petitioner maintained her innocence after her conviction by a jury and before sentence by the District Court and refused to correct its judgment under petitioner's motion under Rule 35 of Federal Rules of Criminal Procedure as to call for an exercise of this Court's power of supervision.

2. That the Court of Appeals in its judgment of October 7, 1968, (Appendix A of this petition) settled a question of law that should be settled by this Court.

3. That the Court of Appeals in its judgment of October 7, 1968, (Appendix A of this petition) rendered a decision in conflict with other Courts of Appeal which conflict should be determined by this Court.

VII

ARGUMENT

1. WAS DENIAL OF PROBATION BY THE DISTRICT COURT ON THE GROUND THAT PETITIONER WOULD NOT PLEAD GUILTY AND THAT SHE MAINTAINED HER INNOCENCE AFTER HER CONVICTION BY A JURY AND BEFORE SENTENCE BY THE DISTRICT COURT AND THE DENIAL OF PETITIONER'S MOTION UNDER RULE 35 OF FEDERAL RULES OF CRIMINAL PROCEDURE AN ABUSE OF DISCRETION OF THE DISTRICT COURT AND DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR?

The decision of the Court of Appeals for the Ninth Circuit of October 7, 1968 (Appendix A of this petition), states:

> ". . . it is *not* an abuse of discretion for a district judge to deny probation to a person who after conviction will not admit wrongdoing."

This clearly is in conflict with the decision of the Seventh Circuit in the case of *U.S. v. Wiley,* 278 F. 2d 500 (7th Cir., 1960), in which the Seventh Circuit stated as follows:

> "The trial judge announced from the bench that it was the standard policy in his court that once the plaintiff stands trial *probation for such defendant would not be considered.* (Italics ours.) It is contrary to the statute and the rule of Criminal Procedure authorizing probation. Such a rule should not be followed." *U.S. v. Wiley,* 278 F. 2d 500, C.A. 7th Cir. (1960).

There is no substantial distinction between the two cases. If probation should not be denied because a defendant refused to plead guilty before trial, it should not be denied because he refused to plead guilty after conviction and before sentence.

This Court under Rule 19, Supreme Court Rules, should grant certiorari and clear up this conflict of decisions.

> "The following . . . indicates the character of reasons which will be considered . . . (b) where the court of appeals has rendered a decision in conflict with the decision of another court of appeals." (Rule 19 Supreme Court Rules.)

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2. THE DECISION OF THE COURT OF APPEALS IN ITS DECISION OF OCTOBER 8, 1968 HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

In the humble opinion of the writer, this case is one of the most important cases to come before this Court.

The privilege of a party convicted of a crime to ask for probation is one of the most important privileges that our citizens have. To say that an innocent person convicted by a jury, in order to ask for probation, must prior to sentence falsely admit "guilt" as a condition of probation violates every purpose of Congress in establishing the probation laws and is shocking and unthinkable. This Court should grant this petition for certiorari and make a final ruling on this important privilege of our citizens and overrule the denial of this inherent privilege of every citizen once and for all. The illegal view of the probation officer, in this case, was as follows:

> *"Defendant continues to maintain* that her husband left her cash of approximately $109,000.00 at the time of his death and *that she is innocent* of the current violation. In view of the defendant's attitude toward her conviction we can see no rehabilitation purpose to probationary supervision." (Reporter's Transcript, December 18, 1967, page 5, lines 18-24.)

The following erroneous ruling of the judge at the hearing of petitioner's motion to correct judgment under Rule 35 of Federal Rules of Criminal Procedure were clearly both illegal.

> "The Court: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here, and of course, that the probation officer's point, *that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate,* so there isn't anything he can do and, further, probation has to be based upon trust and confidence and *if she won't tell the truth to the probation officer or the court, then there's no basis for probation."* (Reporter's Transcript, December 18, 1967, page 2, lines 13-21.)

Especially in view of the fact that this was petitioner's first arrest and in view of her high character in her community.

> "This is a 64-year-old *first offender.* She has a reputation of being a competent and astute businesswoman in her community of Delano. She is an industrious person and performs many of the menial tasks to save labor." (Reporter's Transcript, December 18, 1967, lines 9-13.)

3. THIS PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY RULE ON AN IMPORTANT QUESTION OF FEDERAL LAW, VIZ, WHETHER EVIDENCE DEHORS THE RECORD MAY BE CONSIDERED UNDER A MOTION UNDER RULE 35 OF FEDERAL RULES OF CRIMINAL PROCEDURE.

The decisions of the circuit courts are not unanimous on whether evidence dehors the record can be reviewed in a motion under Rule 35, Federal Rules of Criminal Procedure. This Court says this question is still open and undecided.

> "Whether Rule 35 covers the broader field of collateral attack, where a hearing to consider matters dehors the record we do not her determine." (*Heflin v. U.S.*, 358 U.S. 415, 422, 79 S. Ct. 451 at 453, footnote 7, 1963; 3 L. Ed. 2d 407.)

It is respectfully submitted that there should be a final decision by this Court in accordance with Rule 19-1(b) of the Rules of this Court.

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4. THERE IS A CONFLICT OF OPINION BETWEEN THE OCTOBER 7, 1968, DECISION OF THE COURT OF APPEALS, NINTH CIRCUIT (APPENDIX A) AND OTHER CIRCUITS AS TO WHETHER THE USE OF TESTIMONY WHICH THE PROSECUTOR KNEW OR SHOULD HAVE KNOWN WAS FALSE IS GROUNDS FOR VACATING AND CORRECTING A SENTENCE UNDER RULE 35, FEDERAL RULES OF CRIMINAL PROCEDURE.

The decision of the Court of Appeals for the Ninth Circuit of October 7, 1968 (Appendix A), states the following:

> "The other grounds urged for relief in the Rule 35 motion are . . . that the verdict is based on

> false evidence produced by the government with knowledge of . . . reason to know of its falsity . . ."
>
> "These grounds for relief are not cognizable on a Rule 35 motion." (*Whitfield v. U.S.*, Appendix A.)

This ruling is in direct conflict with other courts of appeal and decisions of this Court:

> ". . . grounds that have been recognized in the cases for a motion to correct, vacate or set aside a sentence or judgment included the following . . . use of perjured testimony." (51.139 Cyc. Fed. Procedure, citing *Black v. U.S.*, 269 F. 2d 38; *Sears v. U.S.*, 265 F. 2d 301.)
>
> "The requirement of due process cannot be deemed to be satisfied if a state has contrived a conviction through the pretense of a trial which in truth is used as a means of depriving a defendant of liberty through deliberate deception of court and jury." (*Mooney v. Hohan*, 294 U.S. 103, 55 S. Ct. 34.)

A ruling by this Court squarely on the point of whether the use of testimony that a prosecutor should have known to be false is grounds for the vacation or correction of sentence under Rule 35, Federal Rules of Criminal Procedure should be made.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said court had in the case num-

ber and entitled on its docket, No. 22,682, Whitfield v. United States of America, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that a judgment herein of said court be reversed by the Court, and for such further relief as to this court may seem proper.

Dated, Fresno, California,
November 1, 1968.

CLAUDE L. ROWE,
Attorney for Petitioner.

(Appendices A, B and C Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARTHA G. WHITFIELD, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 22,682

[October 7, 1968]

Appeal from the United States District Court
for the Eastern District of California

Before: POPE and HAMLEY, Circuit Judges and
PLUMMER, District Judge*

HAMLEY, Circuit Judge:

Mrs. Martha G. Whitfield was convicted on two counts of willful attempt to evade and defeat payment of federal income taxes, in violation of section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. § 7201 (1964). After the trial court denied her application for probation, it imposed a one year sentence on each count, the sentences to run concurrently. On appeal from the conviction, we affirmed. *Whitfield v. United States,* 9 Cir., 383 F.2d 142.

On the day the mandate of this court was issued, Mrs. Whitfield filed in the district court a motion, purportedly under Rule 35, Federal Rules of Civil Procedure, to correct or reduce the sentence. The district court denied the motion and defendant took this appeal.[1]

*The Honorable Raymond E. Plummer, United States District Judge for the District of Alaska, sitting by designation.

[1]On this appeal, Mrs. Whitfield does not ask this court to reduce or modify the sentence. Instead, she asks only that we vacate the sentence and remand the case for resentencing with the instruction that a convicted person has a right to ask for probation without first admitting guilt.

One ground for relief urged in the Rule 35 motion is that the court unlawfully denied defendant probation at the time of sentencing. The denial of probation was unlawful, Mrs. Whitfield asserted,

> ". . . in that said sentence was imposed by the Court under the erroneous and illegal assumption of law that the defendant was not as much entitled to probation where as here she had pled not guilty as a defendant who pleads guilty."

At the oral argument in the district court, and in her brief on this appeal, defendant expands this contention to include the assertion that probation was denied not only because she had pleaded not guilty, but also because, after conviction, she would not admit guilt, nor waive her right to appeal from the judgment of conviction.

There is considerable doubt whether this probation issue is properly before us. Since the denial of probation took place before the appeal from the conviction the issue should have been raised on that appeal. Moreover, strictly speaking, a Rule 35 motion pertains only to the correction or reduction of a sentence; neither the suspension of sentence nor the granting of probation constitutes the correction or reduction of a sentence. See *Phillips v. United States,* 8 Cir., 212 F.2d 327.

In addition, there are expressions in past decisions of this court indicating that an appeal will not lie from the denial of probation. *Bryson v. United States,* 9 Cir., 265 F.2d 9, 13; *Elder v. United States,* 9 Cir., 142 F.2d 199, 201. It is fair to note, however, that *Bryson* relied only on *Elder,* and in *Elder* this court cited, as authority, *Burr v. United States,* 7 Cir., 86 F.2d 502, 503, which held that denial of probation is reviewable for abuse of discretion. See, also, *United States v. Wiley,* 7 Cir., 267 F.2d 453, 278 F.2d 500; *United States v. White,* 3 Cir., 147 F.2d 603.

In this case we elect to disregard these possible barriers to a determination of the probation issue on the merits.

Probation cannot be demanded as of right; it is a privilege which may be granted or withheld within the discretion of the district court. Both the applicable statute (18 U.S.C. § 3651 [1964]) and the applicable rule (Rule 32[e], Federal Rules of Criminal Procedure), use the permissive "may" rather than the mandatory "shall." It follows that if any appellate review of the denial of probation is permissible, the sole issue is whether there was an abuse of discretion.

In general, an abuse of discretion is not shown unless it is manifest from the record that probation was denied for some arbitrary reason wholly unrelated to the statutory standard to be applied in determining whether to grant probation.[2] Abuse of discretion is not shown by the fact that the appellate judges may be strongly of the opinion that if they had been sitting in the place of the district judge they would have granted probation. *United States v. Wiley*, 7 Cir., 278 F.2d 500, 502.

Examination of the record indicates that there is no basis for the assertion that probation was denied Mrs. Whitfield because she pleaded not guilty or because she did not waive her right to appeal the judgment of conviction. In fact, at the hearing on the Rule 35 motion, the district court expressly stated that probation was not denied on either of these grounds.

In the probation report and in a memorandum submitted by the United States Attorney in opposition to the Rule 35 motion, the Government urged that since Mrs. Whitfield persisted in maintaining her innocence even after her conviction, no rehabilitation purpose would be served by granting probation. The district court apparently shared this view, and the record indicates that it was the principal, if not the only, reason that probation was denied.[3] Without intending to intimate what significance it would have were the fact otherwise, it should be noted that there is no suggestion in the record that the district court, in denying probation

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[2]The statutory standard is expressed in the first paragraph of section 3651, as follows:

> ". . . any court . . . when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may . . . place the defendant on probation. . . ."

[3]The following observation made by the district court during the course of the hearing on the Rule 35 motion, is indicative of the district court's point of view:

> "THE COURT: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here and, of course, that's the probation officer's point, that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate, so there isn't anything he can do and, further, probation has to be based upon trust and confidence and if she won't tell the truth to the probation officer or to the court, then there's no basis for probation.
>
> "That's why I think your argument should be limited to no sentence or a jail sentence. I don't think probation is indicated at all. I don't see what the probation officer could do to help her. You haven't told me."

on this ground, was invoking a standard of its own which it uniformly applies in all cases.[4]

Probation is intended to be a means of restoring to society offenders who are good social risks; to afford the unfortunate another opportunity by clemency. *Zerbst v. Kidwell,* 304 U.S. 359. It is designed to aid the rehabilitation of a "penitent offender"; to take advantage of an opportunity for "reformation" which active service of the suspended sentence might make less probable. *Berman v. United States,* 302 U.S. 211, 213, citing *Burns v. United States,* 287 U.S. 216, 220; *Phillips v. United States,* 8 Cir., 212 F.2d 327. As the Supreme Court said in *United States v. Murray,* 275 U.S. 347, 358:

> "Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence."

We need not here decide whether an admission of guilt following conviction, but prior to appeal may, under some circumstances, have such a chilling effect upon the exercise of the right to appeal that it ought not to be exacted as the price for probation. We are not being asked to review the initial denial of probation, but the denial of a Rule 35 motion made after appeal and affirmance. Whatever adverse effect a pre-appeal admission of guilt might have had on defendant's contemplated appeal, no such consideration remained after affirmance of the conviction. Yet defendant persisted in her refusal to concede wrongdoing.

Under these circumstances, the district court did not err in denying the Rule 35 motion. At least where an admission of guilt cannot jeopardize a prospective appeal, and having in view the purpose of probation referred to above, it is not an abuse of discretion for a district judge to deny probation to a person who, after conviction, will not admit wrongdoing.

Two additional grounds for relief urged in the Rule 35 motion are that the sentence was in violation of the maximum authorized by law, and that the sentence amounted to cruel and unusual punishment within the meaning of the Eighth Amendment.

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[4]We make this observation because, on this appeal, defendant asserts that it is "imposible" to distinguish this case from *United States v. Wiley,* 7 Cir., 267 F.2d 453, 278 F.2d 500, 504, where the trial judge announced from the bench that it was the standard policy of his court that a defendant who pleads not guilty, stands trial, and is convicted will not be eligible for probation.

These grounds for relief are frivolous. Under section 7201 of the Internal Revenue Code of 1954, defendant could have been sentenced to five years in prison and fined $10,000 on each of two counts, the sentences to run consecutively. As before indicated, defendant actually received one year concurrent sentences and no fine. On this appeal, defendant offers no argument in support of these two grounds for Rule 35 relief.

The other grounds for relief urged in the Rule 35 motion are that the verdict is unsupported by any evidence in the record and that the verdict is based on false evidence produced by the Government with knowledge of, or reason to know of, its falsity. A number of affidavits were tendered in support of this latter ground alleging facts outside the record.[5]

These grounds for relief are not cognizable on a Rule 35 motion. A proceeding under Rule 35 presupposes a valid conviction. Its only function is to permit correction of an illegal sentence, not to re-examine other proceedings prior to the imposition of sentence. *Redfield v. United States,* 9 Cir., 315 F.2d 76, 81. In such a proceeding extrinsic evidence as to the defendant's innocence is irrelevant. See *Hill v. United States,* 368 U.S. 424, 430; *Gilinsky v. United States,* 9 Cir., 335 F.2d 914, 916, 917.

In her reply brief defendant argues for the first time that our prior decision affirming her conviction, wherein we held that she was not entitled to a full *Miranda* warning *(Miranda v. United States,* 384 U.S. 436), was overruled by the Supreme Court in *Mathis v. United States,* 391 U.S. 1, which held that investigators of the Internal Revenue Service are bound by the *Miranda* warning requirements.

Defendant misreads our prior decision. We based that decision on the fact that *Miranda* is applicable only to persons whose trials had not begun as of June 13, 1966. *Johnson v. New Jersey,* 384 U.S. 719, 734; Mrs. Whitfield's trial began in October, 1965. Thus *Mathis v. United States* is irrelevant to our prior decision and does not change defendant's rights in any way.

Affirmed.

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[5]The evident purpose in offering these affidavits was to bring before the district court new or additional evidence tending to show that defendant should not have been convicted of income tax evasion on the "net worth" theory. However, defendant did not move to set aside the judgment and grant a new trial on the ground of newly-discovered evidence, pursuant to Rule 60(b)(2), Federal Rules of Civil Procedure.

Appendix B

United States District Court
Eastern District of California
at Fresno

U. S. A. v. Martha G. Whitfield

No. 4167-ND Criminal
Minutes of the Court
Date: 12/18/67

Present: Hon. M. D. Crocker, District Judge

Deputy Clerk: R. W. Glover; Reporter: Ken Smith

U. S. Attorney, by Asst. U. S. Attorney:
Ronald S. Morrow

Defendant: On bond; Counsel: Claude Rowe
and Lucius Powers, retained

PROCEEDINGS: MOTION OF DEFENDANT FOR REDUCTION OF SENTENCE.

Motion is argued by respective counsel and Ordered that said motion is denied. Points and authorities to be filed by Claude Rowe as to the preparation of findings of fact, conclusions of law.

Question as to the time the defendant is to surrender to the U. S. Marshal is held in abeyance at this time.

John A. Childress, Clerk,
By R. W. Glover, Deputy.

Appendix C

United States District Court
Eastern District of California
at Fresno

U. S. A. v. Martha G. Whitfield

No. 4167-ND Criminal
Minutes of the Court
Date: December 6, 1965.
At: Fresno, Calif.

Present: Hon. M. D. Crocker, District Judge

Deputy Clerk: R. W. Glover; Reporter: Ken Smith

U.S. Atty, by Assistant U.S. Atty: Michael Balaban

Defendant: On bond; Counsel: Donald Jackson, retained

PROCEEDINGS: HEARING ON PROBATION REPORT AND FOR RENDERING OF JUDGMENT AS TO THE 2 COUNTS IN THE INDICTMENT.

The U. S. Attorney and the defendant with her attorney are in court. The defendant is arraigned for judgment and no legal cause being shown why judgment should not be pronounced, Ordered defendant be committed to the custody of the Attorney General for a period of One (1) year as to the charge in Count 1 of the Indictment. A like sentence is pronounced as to count 2 and Count 2 is to begin and run concurrently with Count 1 of the Indictment. A stay of execution is granted until January 5, 1966 at 10:00 a.m.

at which time the defendant is to surrender to the U. S. Marshal for execution of this judgment.

The bond of the defendant will be exonerated upon her surrender to the U. S. Marshal.

John A. Childress, Clerk,
By R. W. Glover, Deputy.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 709

MARTHA G. WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. i-v) is not yet officially reported.

JURISDICTION

The opinion of the court of appeals was filed on October 7, 1968. (Pet. i.) The petition for certiorari was filed on November 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's refusal to place petitioner on probation and to suspend execution of sentence, wholly or partly on the ground that petitioner refused, even after affirmance of her conviction, to admit her guilt, constituted reversible error.

2. Whether, upon her motion to correct or reduce sentence, petitioner was entitled to introduce evidence designed to show that she was innocent of the crime for which she was sentenced and that conviction was obtained by evidence known to the prosecutor to be false.

STATUTE AND RULE INVOLVED

18 U.S.C. 3651:

Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as

well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

* * * *

Rule 35 of the Federal Rules of Criminal Procedure:

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

STATEMENT

After a jury trial, petitioner was convicted on two counts of willful attempt to evade her federal income tax for 1958 and 1959. The district court denied her application for probation and imposed a one year sentence on each count, the sentences to run concurrently. In her original appeal, petitioner contested only the conviction and not the legality or propriety of the sentence. (Pet. i-ii.) The court of appeals affirmed the conviction. *Whitfield* v. *United States*, 383 F. 2d 142, 145 (C.A. 9).

On the day when the mandate of the court of appeals issued, petitioner filed in the district court a motion, purportedly under Rule 35 of the Federal Rules of Criminal Procedure, to correct or reduce the sentence. The district court denied the motion. (Pet. i.) At the hearing on the motion, the court made the following observations (II-R. 11-13):[1]

> THE COURT: My point is that that is what the probation officer had in mind in his report, that there is nothing that he can do to help Mrs. Whitfield. This isn't a case for rehabilitation, which is what the probation officer would be working on, so I think that that is what he had in mind.
>
> The matter of sentence is left up to me as to whether to give her ten years or $20,000 fine and I just though I was real lenient in only making it one year.
>
> * * * *

[1] "II-R." refers to the record in the court of appeals. The court of appeals has quoted some of this material. (Pet. iii, fn. 3.)

THE COURT: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here and, of course, that's the probation officer's point, that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate, so there isn't anything he can do and, further, probation has to be based upon trust and confidence and if she won't tell the truth to the probation officer or to the court, then there's no basis for probation.

That's why I think your argument should be limited to no sentence or a jail sentence. I don't think probation is indicated at all. I don't see what the probation officer could do to help her. You haven't told me.

* * * *

THE COURT: She wasn't denied probation on that ground. She was denied probation on the basis that there wasn't anything the probation officer could do to help her. There wasn't anything he could do.

* * * *

THE COURT: The probation officer just reached the conclusion that there wasn't anything he could do to help her when he said that probation should not be granted and you haven't told me anything the probation officer could do to help Mrs. Whitfield in this case.

In its opinion affirming the denial of petitioner's motion, the court of appeals concluded that there was no abuse of discretion in denying probation in this case, since petitioner would not admit wrongdoing, even after her conviction had been affirmed on appeal, and the purpose of probation is the rehabilitation of the offender (Pet. iv).

ARGUMENT

1. The basic question here is whether the district court, in determining whether or not to grant probation, could properly consider the fact that petitioner, whose guilt had been established to the satisfaction of the jury, the district court, and the court of appeals, nevertheless persisted in denying her guilt. We submit that the district court was justified in giving weight to such fact, and petitioner suggests no reason (Pet. 8-9) for thinking otherwise. The probation statute (18 U.S.C. 3651, *supra*, p. 2) "was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender." *Burns* v. *United States*, 287 U.S. 216, 220; *Berman* v. *United States*, 302 U.S. 211, 213. The statute itself declares that a district court *may* suspend sentence and grant probation "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." 18 U.S.C., Section 3651. Here, the district court declared no general rule that would require imposition of a prison sentence on all convicted defendants who persisted in denying their guilt. The judge determined only that, since petitioner refused to admit her guilt, no useful purpose would be served by placing her on probation. He clearly recognized that, even though he did not place petitioner on probation, he still had the option of not imposing a prison sentence. The fact that he determined that a one-year prison sentence was appropriate here does not evidence a general policy of impos-

ing prison sentences on all who refuse to admit their guilt.[2]

2. This case does not present the broad question of whether evidence "dehors the record" may be "reviewed" (Pet. 10) or considered for any purpose on a motion under Rule 35; it presents only the narrow question of whether a district court, on such a motion, must consider affidavit evidence designed to show that petitioner was wrongly convicted.[3] Clearly such evidence is irrelevant, since Rule 35 relates only to the validity of a sentence and is not a substitute for Rule 33 or for 18 U.S.C. 2255, which permit collateral attack on a judgment of conviction. On a motion to correct or reduce a sentence, the conviction itself is presumed valid. See *Hill* v. *United States*, 368 U.S. 424, 430;[4] *Petro* v. *United States*, 368 F. 2d 807,

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[2] This case is not in conflict with *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7). There, the district court refused to consider the possibility of probation because of its policy of denying probation in the case of any person who had chosen to go to trial rather than to plead guilty. Here, the district court simply determined that the particular case was one in which probation was not appropriate.

[3] The judgment of conviction became final upon affirmance on September 11, 1967 (*Whitfield* v. *United States*, 383 F. 2d 142 (C.A. 9)); petitioner could file such a motion even now, on the ground of newly discovered evidence, since Rule 33 allows "two years after final judgment" for that purpose.

[4] After the decision in *Hill* v. *United States*, *supra*, Rule 35 was amended February 28, 1966, to include the correction of sentences "imposed in an illegal manner" (in *Hill*, the petitioner was sentenced without opportunity to speak on his own behalf), but this amendment obviously does not reach the present case.

808 (C.A. 6); *United States* v. *Garfinkel*, 285 F. 2d 548, 551 (C.A. 7); *Gilinsky* v. *United States*, 335 F. 2d 914, 916 (C.A. 9).

Petitioner contends (Pet. 10-11) that there is a conflict as to whether Rule 35 permits a showing that false testimony was knowingly used to obtain the conviction, citing *Mooney* v. *Holohan*, 294 U.S. 103, *Black* v. *United States*, 269 F. 2d 38 (C.A. 9), and *Sears* v. *United States*, 265 F. 2d 301 (C.A. 5). But those cases are not in point since they involved either petitions for habeas corpus or petitions under 18 U.S.C. 2255. The decision here does not foreclose petitioner from seeking relief under either Rule 33 or Section 2255.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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